IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.GIRI

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

WP(C).No. 32850 of 2006(I)

PETITIONER:

C.MADHUMANI,
SUB INSPECTOR OF POLICE, (UNDER SUSPENSION),
KAVUVILAVEEDU, VIZHINJAM P.O., TRIVANDRUM.

BY ADV. SRI.P.RAVINDRAN

RESPONDENTS:
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1. **STATE OF KERALA, REP. BY ITS**
   SECRETARY, HOME DEPARTMENT,
   GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. **DIRECTOR GENERAL OF POLICE,**
   KERALA, THIRUVANANTHAPURAM.

3. **DEPUTY INSPECTOR GENERAL OF POLICE,**
   ARMED POLICE BATTALION,
   THIRUVANANTHAPURAM.

4. **INSPECTOR GENERAL OF POLICE,**
   ARMED POLICE BATTALION & TP,
   ARMED POLICE HEADQUARTERS,
   THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI. NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

WPC.NO.32850/2006 I

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE ORDER NO.G5/65767/03 DTD. 5/07/03.

EXT.P2; COPY OF THE ORDER NO.A2-6372/03 APB DTD. 3/08/03.

EXT.P3: COPY OF THE MEMO DTD. 29/09/2003.

EXT.P4: COPY OF THE RELEVANT EXTRACT OF THE ORDER OF THE COMMISSIONER OF CUSTOMS DTD. 29/04/04.

EXT.P5; COPY OF THE ORDER NO.A2/6372/03/APB DTD. 14/10/04.

EXT.P6; COPY OF THE JUDGMENT IN W.P.30189/05 DTD. 16/11/05.

EXT.P7: COPY OF THE COMMUNICATION DTD. 21/04/06.

EXT.P8: COPY OF THE COMMUNICATION DTD. 8/05/06.

EXT.P9: COPY OF THE SHOW CAUSE NOTICE DTD. 2/11/2006.

EXT.P10: COPY OF THE ENQUIRY REPORT.

EXT.P11: COPY OF THE REPLY DTD. 6/11/2006.

EXT.P12: COPY OF THE ORDER DTD. 23/11/2006.

/TRUE COPY/

P.S.TO JUDGE

KSS

V.GIRI, J.

W.P.C.NO.32850 OF 2006 I

Dated this, the 6th September, 2007.

JUDGMENT

The petitioner, while working as a Sub Inspector of Police attached to the Armed Reserve Battalion, was posted to the Special Branch C.I.D and posted in the Thiruvananthapuram Airport. On 17.6.2003 the Customs Officials of the International Airport, registered a case against an international passenger, under the provisions of the Customs Act, for attempting to illegally import mobile phones. Steps were taken by the Customs Authorities under the Customs Act, against the petitioner also on the premise that he was an accessory to the import of mobile phones, sought to be effected by the passenger. There was initially a proposal to impose a fine under the Customs Act on the petitioner as well. By Ext.P4 order, the Commissioner of Customs ordered confiscation of the goods which were seized earlier. The passenger who was trying to import the goods was found to have contravened the provisions of the Customs Act.

2. He was permitted to redeem the contraband on payment of redemption fine. The petitioner was exonerated from proceedings under the Customs Act, but a word of warning was sounded to him to be more upright, transparent and careful in his official dealings with international passengers in future.

3. After the incident that led to the proceedings under the Customs Act had taken place, the petitioner was repatriated to his parent department. Disciplinary proceedings were initiated against him. An oral enquiry conducted under the provisions of the Kerala Police (Departmental Enquiries, punishment and appeal) Rules, 1958 [for short "the Rules"] established a prima facie case against the petitioner. Memo of charges was served on him and a detailed enquiry was conducted. According to the petitioner, on completion of the said enquiry, it apparently was concluded by the Inquiring Authority, that no misconduct as such has been committed by the petitioner.

4. The enquiry report was submitted before the Inspector General of Police, the disciplinary authority. The disciplinary authority proceeded to issue Ext.P5 order holding that there are certain lapses which have been detected in the enquiry and the materials placed by the Inquiring Authority before the disciplinary authority and that the matter is to be enquired in detail. The disciplinary authority, therefore, decided to conduct a de novo enquiry. A different officer was appointed. The said order passed by the Inspector General of Police Ext.P5 was challenged by the petitioner in W.P.(C) No.30189/05. Referring to earlier judgments of this court rendered in the context of the Kerala Civil Services (Classification, Control and Appeals) Rules, this court went on to find that the orders directing a de novo enquiry is, therefore, void and deserves to be set aside. The operative portion of Ext.P6 judgment reads as follows:

> **"Ext.P7 deserves to be set aside and is hereby quashed. It is open to the competent**

> **authority to apply its mind to the records of enquiry and take appropriate decision in accordance with law. Counsel for the petitioner submits that the petitioner has been under suspension ever since 05.07.03. Now that, Ext.P7 is no more in force, it is for the competent authority to consider immediately the request of the petitioner for reinstatement and pass appropriate orders, in accordance with law. Writ petition is allowed as above."**

5. The enquiry, which is referred to in paragraph 7 of Ext.P6 judgment, had been completed then. Copy of the said enquiry report had not been furnished to the petitioner. It is that enquiry which was set aside in Ext.P5. Ext.P5, in turn, was set aside by Ext.P6 judgment. This court restored the position prior to the passing of Ext.P5 order and consequently, the parties were placed in the position prevailing at a point of time prior to the passing of Ext.P5 order. This court interdicted the disciplinary authority from conducting a de novo enquiry, essentially, but the disciplinary authority was permitted to proceed further from the stage of completion of the enquiry

and submission of enquiry report by the Inquiring Authority to the disciplinary authority.

6. But apparently, construing the liberty granted in Ext.P6 judgment as enabling him to conduct a further enquiry as such, Ext.P7 was issued by the Inspector General of Police directing a further enquiry to be conducted by another officer. It seems that Ext.P7 was issued on the basis of a direction issued by the Director General of Police. Such further enquiry was conducted and after completion of the enquiry, copy of Ext.P10 enquiry report was forwarded to the petitioner along with a show cause notice, Ext.P9, where under the disciplinary authority proceeded to find that the charges levelled against the petitioner were proved beyond doubt and it was decided provisionally, to dismiss the petitioner from service. The petitioner was permitted to show cause against the proposed punishment. The petitioner proceeded to submit an explanation, Ext.P11, which was not found to be satisfactory by the disciplinary authority. Ext.P12 order was passed by the

Inspector General of Police dismissing the petitioner from service in accordance with the Rules. It is Ext.P12, which has been challenged by the petitioner in this writ petition.

7. A counter affidavit has been filed on behalf of the respondents, controverting the allegations in the writ petition.

8. I heard learned counsel Mr.Ravindran as also the learned Senior Government Pleader Mr.Nandakumar.

9. Mr.Nandakumar, at the outset, pointed out that the petitioner has got an alternate remedy, which is efficacious. Therefore, there is no reason why the petitioner should approach this court under Article 226 of the Constitution, before exhausting the said remedy.

10. This submission is well conceived. I would have normally accepted this submission and relegated the petitioner to the alternate remedy. But, after having heard the counsel on both sides, and in view of the nature of the direction

which I propose to pass, I am disposing of the writ petition on merits.

11. Further more, the writ petition was actually entertained and has been on the files of this court since 2006. Really, I am not going into the disputed questions of fact and therefore, in the circumstances, I propose to consider the writ petition on its merits. No doubt, had this court relegated the petitioner to an alternate remedy at the stage of admission, such an order would have been perfectly justified.

12. Essentially, the contentions raised by the learned counsel for the petitioner are two fold. He contends first that, on completion of the enquiry under the Rules, a report was submitted by the Inquiring Authority to the disciplinary authority. The disciplinary authority, in terms of the Rules, could have either accepted the report or rejected the same in full or in part. If he was satisfied that the report cannot be accepted, he may indicate his own findings as

regards the charges levelled against the petitioner under Rule 6 (11) of the Rules.

13. The power of the disciplinary authority to disagree with the findings of the Inquiry Officer under the very same Rules in question has been upheld by a Division Bench of this Court in the decision reported in **State of Kerala v. Venugopal {2002(1) K.L.T. 146}.**

14. If the disciplinary authority decides not to accept the enquiry report, he is entitled to further proceed in the matter in terms of Rule 6(11) of the Rules. He should record his findings on the several charges enquired into. The further procedure to be followed in this regard is mentioned in Rule 17 of the Rules. After recording his findings on each of the charges, the member of the service shall be served with a copy of the report of enquiry together with the findings thereon. He shall, then, be given an opportunity to make a representation in relation to the findings of the disciplinary authority proposed in terms of Rule 17(b) as also against the

findings of the enquiry officer. The representation shall be taken into consideration before the final order imposing the penalty is passed by the competent authority.

15. Rules do not, therefore, contemplate either a de novo enquiry or a further Inquiry, which apparently was ordered under Ext.P7 in the present case. When the department was faced with Ext.P6 judgment, wherein this court found that de novo enquiry is illegal. Thus, in the light of Ext.P6 which set aside Ext.P5, what was open to the disciplinary authority was to construe himself at the stage contemplated under Rule 17 of the Rules and then proceed further in accordance with law. Thus, if he was disagreeing with the findings of the inquiring officer, he was entitled to do so. But he has to record his findings on each of the charges in terms of Rule 6(11) and then forward a copy of the enquiry report along with his findings on the charges in question to the delinquent official. This was not done in the present case. What was done was to conduct a further enquiry through a

different officer, which led to Ext.P10 enquiry report. Further more, Ext.P10 was apparently accepted by the disciplinary authority in toto and then Ext.P9 notice was issued to the petitioner, where under the disciplinary authority proposed to impose a punishment of dismissal from service.

16. In my opinion, the procedure followed subsequent to Ext.P6 judgment is illegal. The action on the part of the disciplinary authority to order a de novo enquiry was found illegal by this court in Ext.P6 judgment and Ext.P5 order, by which a de novo enquiry was conducted, was set aside. Once it is found to be illegal, it is obviously beyond the powers of the disciplinary authority to conduct a further enquiry in terms of the Rules. In the circumstances, he was entitled to either accept or reject in toto the report of the inquiring authority and come to his own conclusions against the charges levelled against the delinquent official. Ext.P7 apparently was old wine in a new bottle. What was cancelled was the de novo Inquiry which was later labelled as an enquiry by a different

officer. Ext.P5 itself was set aside in Ext.P6 judgment. Ext.P7 is therefore clearly unsustainable. Once it is so held, then the enquiry which was conducted in pursuance of the direction, may not qualify as a material to be taken note of by the disciplinary authority as a basis for any action against the petitioner under the Rules. Ext.P10 enquiry report is liable to be eschewed from consideration.

17. If this be the position, then the question is, what are the further steps that could be taken by the disciplinary authority. The disciplinary authority can and shall consider the report of Inquiry, which was submitted before him prior to Ext.P5. He shall then proceed from the stage contemplated by Rule 6(11). He shall forward a copy of the enquiry report which was submitted to him prior to Ext.P5 along with his findings on each of the charges. He shall give an opportunity to the delinquent official to file a representation against the findings in the enquiry report and findings entered into by him as regards the charges. He shall consider such a

representation and then decide a suitable punishment to be imposed on the petitioner. This is the procedure which he may follow in this case.

18. Mr.Ravindran as well as Mr.Nandakumar referred to the decision of the Constitution Bench of the Supreme Court in **Managing Director, ECIL v. B.Karunakar {AIR 1994 SC 1074}**. Reference was made particularly to the finding of the Constitution Bench at page 1089 of the report. Reference can be made with the following portion of the judgment of the Supreme Court:

> **"While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry, viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The**

> **second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the 42nd Amendment."**

19. Thus, the petitioner is to be served with a copy of the enquiry report, which was submitted before the disciplinary authority prior to Ext.P5 and he must be given an opportunity to represent against the enquiry report or any findings of the disciplinary authority on the charges levelled against him, prior to the disciplinary authority finding whether the charges levelled against the petitioner should be held as 'proved' and prior to deciding whether an appropriate punishment must be imposed on him. The following extract from the report of the Supreme Court decision above is also significant in this regard.

> **"The next question to be answered is what is the effect on the order of punishment when the report of the Inquiry Officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question**

has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and

> **exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."**

20. Mr.Nandakumar also refers to the directions issued by the Supreme Court in the above mentioned case where an enquiry report is actually set aside by a court or tribunal and the nature of the directions to be issued in such a case. He contends that reinstatement of the delinquent official does not follow as sequiter. The disciplinary authority should be directed, in such cases, to furnish a copy of the enquiry report; to proceed in accordance with the Rules from the stage of furnishing a copy of the enquiry report and to consider the representation of the delinquent official which is permitted to be made in this regard.

21. Once it is found that the proceedings taken subsequent to Ext.P6 judgment resulting in a further enquiry as such is illegal, obviously, the order of punishment imposed on the petitioner also becomes illegal. The disciplinary authority is

to be directed to retrace the steps from the stage which was prevailing on the date of Ext.P6 judgment.

In the result, the writ petition is allowed in part. Exts.P7, P9 and P12 are set aside. The disciplinary authority, the 4th respondent, shall furnish a copy of the enquiry report referred to in Ext.P5, along with his findings as contemplated by Rule 6(11) of the Rules. The petitioner shall be given an opportunity to make a representation against the findings of the inquiring authority with the tentative findings of the disciplinary authority. The disciplinary authority shall consider the representation of the petitioner and if he comes to the conclusion that the charges levelled against the petitioner will have to be treated as 'proved', he shall give notice in terms of Rule 17(b) proposing a suitable punishment. The petitioner shall be given an opportunity to represent against the proposal for punishment. The said representation shall be considered and appropriate action shall be taken by the disciplinary authority after hearing the petitioner as well. The entire

proceedings as outlined above shall be completed within three months from the date of receipt of a copy of this judgment.

Writ petition is disposed of in the above terms.

Sd/-
(**V.GIRI)**
JUDGE

sk/-

//true copy//

V.GIRI, J.

W.P.C.NO.32850 of 2006 l

JUDGMENT

6th September, 2007.